

**BEFORE THE NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

HARRY R. MEISTER, CO-TRUSTEE,)
HARRY R. MEISTER & BONNIE M.)
MEISTER LIVING TRUST,)
))
Appellant,)
))
v.)
))
SCOTTS BLUFF COUNTY BOARD OF)
EQUALIZATION,)

Case No. 09R 165

DECISION AND ORDER
AFFIRMING THE DECISION OF
THE SCOTTS BLUFF COUNTY BOARD
OF EQUALIZATION

Appellee.

The above-captioned case was called for a hearing on the merits of an appeal by Harry R. Meister, Trustee, Harry R. Meister & Bonnie M. MEISTER Living Trust ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Hampton Inn, 301 W Hwy 26, Scottsbluff, Nebraska, on June 1, 2010, pursuant to an Order for Hearing and Notice of Hearing issued February 26, 2010. Commissioner Wickersham, Chairperson of the Commission, was the presiding hearing officer. Commissioner Warnes was absent. Commissioner Wickersham, as Chairperson, designated Commissioners Wickersham, Salmon, and Hotz as a panel of the Commission to hear the appeal. Commissioner Hotz was excused. Commissioner Salmon was present. The appeal was heard by a quorum of a panel of the Commission.

Harry R. Meister, Trustee of Harry R. Meister & Bonnie M. MEISTER Living Trust, was present at the hearing. No one appeared as legal counsel for the Taxpayer.

Tiffany Wasserberger, County Attorney for Scotts Bluff County, Nebraska, was present as legal counsel for the Scotts Bluff County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits, and heard testimony.

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-5018 (Reissue 2009). The final decision and order of the Commission in this case is as follows.

I. ISSUES

The Taxpayer has asserted that actual value of the subject property as of January 1, 2009, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining actual value of the subject property is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2009.

II. FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2009, ("the assessment date") by the Scotts Bluff County Assessor, value as proposed in a

timely protest, and actual value as determined by the County Board is shown in the following table:

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Description: Lt E1-A, Sub of Replat of Berggren-Kleven Sub & Replat of Lts 1-2-3, Blk 5, George Baltes Add, Scotts Bluff County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$12,000.00	\$12,000.00	\$12,000.00
Improvement	\$209,236.00	\$169,764.00	\$209,236.00
Total	\$221,236.00	\$181,764.00	\$221,236.00

4. An appeal of the County Board's decision was filed with the Commission.
5. An Order for Hearing and Notice of Hearing issued on February 26, 2010, set a hearing of the appeal for June 1, 2010, at 10:00 a.m. MDST.
6. An Affidavit of Service, which appears in the records of the Commission, establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
7. Actual value of the subject property as of the assessment date for the tax year 2009 is:

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Land value \$ 12,000.00

Improvement value \$209,236.00

Total value \$221,236.00.

**III.
APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Reissue 2009).
2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2009).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2009).
4. “Actual value, market value, and fair market value mean exactly the same thing.”
Omaha Country Club v. Douglas County Board of Equalization, et al., 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2009).

6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Reissue 2009).
7. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
8. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization, fixing or determining valuation of real estate for tax purposes, is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
9. The presumption disappears if there is competent evidence to the contrary. *Id.*
10. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2008).
11. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
12. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).

13. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
14. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
15. "An owner who is familiar with his property and knows its worth is permitted to testify as to its value." *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).
16. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
17. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
18. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965).

IV. ANALYSIS

The subject property is an improved parcel. Improvements on the parcel include a 2,037 square foot townhouse/duplex, a swimming pool, and a yard shed. (E3:2). The Townhouse, built in 1982, has an attached 546 square foot garage and a 1,414 square foot basement. (E3:2). The finished portion of the basement was 1,074 square feet for the tax year 2009.

The Taxpayer testified that the subject property and the adjoining parcel had not been changed during the 2008 tax year. The Taxpayer then asserts that because the 2009 assessment was based on unchanged improvements, physical characteristics and attributes of the two parcels, any change in valuation of the two parcels for the tax year 2009 should have a common relationship to the 2008 assessments. The Taxpayer contends that the amount of the increase in valuation and the percentage increase in value of the subject property from the tax year 2008 to 2009 was greater than the amount of the increase in valuation and the percentage increase in value for an adjoining parcel. However, the amount of the increase in valuation and the percentage increase in value of the subject property from the tax year 2008 to 2009 was greater than the amount of the increase in valuation and the percentage increase in value for a adjoining parcel. The Taxpayers argument is rooted in mathematics but assessment is more than mathematics. The evidence is that both the subject property and the adjoining parcel were reassessed for the tax year 2009. Changes made to the assessment records, that is the basis for assessment of the subject parcel and the adjoining parcel, are not shown in the record. Changes to the assessment record for the year 2010 are in the record, however, and show the affect of changes. There is no evidence that the assessment records for the two parcels were unchanged

from tax year 2008 to 2009. The fact that assessment records change and other factors affecting a determination of value change from year to year has caused Nebraska’s Supreme Court to hold that a prior year’s assessment is not relevant to the subsequent year’s valuation. See *DeVore v. Bd. Of Equal.*, 144 Neb. 351, 13 N.W.2d 451 (1944); *Affiliated Foods Coop v. Madison Co. Bd. Of Equal.*, 229 Neb. 605, 428 N.W.2d 201 (1988). The Taxpayer’s assertion that actual value of the subject property should be determined with reference to the adjoining parcel is not persuasive.

The Taxpayer did not offer an opinion of value. The Taxpayer did present information concerning parcels sold in the subject property’s assessment neighborhood. The physical characteristics, attributes and amenities of the subject property and the parcels presented by the Taxpayer with assessment and sale information, are summarized in the following tables.

Descriptor	Subject	Parcel 1	Parcel 2	Parcel 3
Exhibit	E3	E4	E5	E6
Location	458 Lincoln Ct	414 Lincoln Ct	14 Brentwood Ct	27 Brentwood Ct
Lot Size				
Condition	Good +	Good +	Good	Good
Quality	Good	Good	Av +	Av +
Yr Built	1982	1982	1993	1997
Exterior Walls	Stucco	Stucco	80% Masonry Veneer 20% Hardboard	80% Masonry Veneer 20% Hardboard
Style	Townhouse	Townhouse	Townhouse 2 St	Townhouse
Area Above Ground	2,038	1,803	2,150	1,088
Roof Type				

Roof Cover	Wood Shingle	Wood Shingle	Comp shingle	Comp Shingle
HVAC	100%	100%	100% Heat Pump	100% Heat Pump
Basement	1,414	1,020	1,360	1,568
Finished	1,284	1,020		1,088
Crawl	588	783		
Bedrooms	1	2	3	2
Bathrooms	3	3	2.5	3
Garage Type	Attached	Attached	Attached	Attached
Garage Area	546	484	440	462
Misc Imp	Swimming Pool, Fireplace, Wood Deck, Yard shed	Fireplace, Wood Deck	Dormer, Porch	Porch
Lot Value	\$12,000	\$12,000	\$12,000	\$12,000
Imp Value	\$209,236	\$187,286	\$172,365	\$165,706
Taxable Value	\$221,236	\$199,286	\$184,365	\$177,706
Sale Date		4/29/05	1/21/09	7/1/08
Sale Price		\$195,000	\$169,000	\$185,500

Descriptor	Subject	Parcel 4	Parcel 5	Parcel 6
Exhibit	E3:2	E7	E8	E9
Location	458 Lincoln Ct	32 Brentwood Ct	707 Monument Cr	3010 Monument Shadows
Lot Size				
Condition	Good +	Good	Average	Av
Quality	Good	Av +	Good	Av
Yr Built	1982	1997	2003	1982

Exterior Walls	Stucco	80% Masonry Veneer 20% Hardboard	5% Masonry Veneer 95% Metal	Stucco
Style	Townhouse	Townhouse	Townhouse	Townhouse 2 St
Area Above Ground	2,038	1,577	1,114	1,008
Roof Type				
Roof Cover	Wood Shingle	Comp Shingle	Comp Shingle	Comp Shingle
HVAC	100%	Heat Pump	Radiant Ceiling, Duct	Baseboard Elec
Basement	1,414	1,577	1,114	504
Finished	1,284	1,349		
Crawl	588			
Bedrooms	1	2	2	2
Bathrooms	3	3	2.5	1.5
Garage Type	Attached	Attached	Attached	
Garage Area	546	440	480	
Misc Imp	Swimming Pool, Fireplace, Wood Deck, Yard shed	Porch	Patio	Porch
Lot Value	\$12,000	\$12,000	\$22,500	\$2,000
Imp Value	\$209,236	\$168,763	\$127,739	\$51,599
Taxable Value	\$221,236	\$180,763	\$150,239	\$53,599
Sale Date		11/13/08	8/2/08	12/9/08
Sale Price		\$173,000	\$156,900	\$53,500

The Taxpayer testified that in his opinion parcel 2 was the parcel that is the most comparable to the subject property. Parcel 2 is newer and larger than the subject property, has a smaller basement none of which is finished, its garage is smaller and it does not have a

swimming pool. Comparable properties share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, 98. When using “comparables” to determine value, similarities and differences between the subject property and the comparables must be recognized. *Property Assessment Valuation*, 2nd Ed., 1996, 103. Most adjustments are for physical characteristics. *Property Assessment Valuation*, 2nd Ed., 1996, 105. The sale of parcel 2 on January 21, 2009, for \$169,000 cannot be used to determine actual value of the subject property without adjustments for the differences noted above. There is no evidence on which to base adjustments. There is, therefore, no basis for relief.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2009, is affirmed.
2. Actual value, for the tax year 2009, of the subject property is:

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Land value	\$12,000.00
Improvement value	<u>\$209,236.00</u>
Total value	<u>\$221,236.00.</u>

3. This decision, if no appeal is timely filed, shall be certified to the Scotts Bluff County Treasurer, and the Scotts Bluff County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Reissue 2009).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2009.
7. This order is effective for purposes of appeal on July 14, 2010.

Nancy J. Salmon, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (REISSUE 2009), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.

I concur in the result.

The analysis above considers two standards of review for review. One standard of review is stated as a presumption found in case law, the other is found as stated in statute. I do not believe consideration of two standards of review are required by statute or case law.

The Commission is an administrative agency of state government. See *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. *Id.* The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Supp. 2007). In general, the Commission may only grant relief on appeal if it is shown that the order, decision, determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Cum. Supp. 2008).

The Commission is authorized to review decision of a county board of equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of county board of equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. *Id.* A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621

(1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See *id.* In 1959, the legislature provided a statutory standard for review by the district courts of county board of equalization, assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g., *Ideal Basic Indus. V. Nuckolls Cty. Bd. Of Equal.*, 231 Neb. 653, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g., *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of

equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. V. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory standard remains. See *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The third possibility requires analysis. The presumption and the statutory standard of

review are different legal standards, and the statutory standard remains after the presumption has been overcome. See *id.* The burden of proof to overcome the presumption is competent evidence. *Id.* Clear and convincing evidence is required to show that a county board of equalization's decision was unreasonable or arbitrary. See, e.g., *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York*, *supra*. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

Use of the presumption as a standard of review has been criticized. See G. Michael Fenner, *About Presumptions in Civil Cases*, 17 Creighton L. Rev. 307 (1984). In the view of that author, the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. See *Gordman Properties*

Company v. Board of Equalization of Hall County, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

Wm R. Wickersham, Commissioner